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No. 81-125

In the Supreme Court of the United States

October Term, 1981

CARDINAL FEDERAL SAVINGS & LOAN ASSOCIATION,
Petitioner,

vs.

JUDY V. DAVIS, Individually and As Administratrix of the Estate of DANNY I. DAVIS, DECEASED,
Respondent

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the State of Ohio

BRIEF OF RESPONDENT

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SUPPLEMENTAL STATEMENT OF THE CASE CORRECTING INACCURACIES AND OMISSIONS OF FACT IN PETITIONER'S STATEMENT

The facts disclosed in Petitioner's Statement of the Case, although couched in terms and emphasis most favorable to Petitioner, is sufficient for this Court's consideration of the limited issue of the denying or granting of a writ of certiorari, except for the following corrections of inaccuracies and omissions of fact:

Inaccuracies

Inaccuracy No. 1:

Petitioner states at pages 6 and 7 of its brief that the Federal Reserve Regulation Z form "is the sole basis for the holdings of the Ohio Courts that Petitioner Ashtabula S & L is liable to Respondent Davis for the full unpaid balance of the note secured by the mortgage".

Inaccuracy No. 2:

Petitioner states at page 11 of its brief that "The entire case is thus predicated upon the language of the precontractual Regulation Z form, and nothing more."

Inaccuracy No. 3:

Petitioner states at pages 12 and 13 of its brief that the two official syllabi of the Ohio Supreme Court's opinion (App. A1) "show that such court based its affirmance of the lower state courts' judgments squarely upon the language of the Regulation Z disclosure form and not upon any other fact or document in the case".

Correction of Inaccuracies Nos. 1, 2, and 3

Aside from the fact that the above statements are argumentative they are inaccurate. It has been solely the contention of the Petitioner, instead of the Ohio Courts, to suggest that the determination of the case hinged on the Federal Regulation Z form and the Federal Truth in Lending Act.

All three levels of Ohio courts, consisting of a composite of 11 judges, unanimously agreed without any dissent that the case was predicated upon the principles of the Ohio common law of contract and negligence. (See Petitioner's Appendix at both pages A8 and A9 wherein the Ohio Supreme Court specifically ruled on the basis of a breach of an implied fiduciary duty by the Petitioner Savings and Loan Company under Ohio tort and contract common law which determination was found to be entirely consistent with the existence of the federal truth-in-lending law.)

Omissions

Petitioner failed to relate that the record discloses that prior and in addition to the execution of the Regulation Z form that, among other things, the decedent Respondent and Petitioner Savings and Loan's officer discussed the subject of mortgage insurance coverage. The Savings and Loan

officer told them that if they desired mortgage life insurance that they should sign at the proper place upon the Regulation Z form which was given to them.

The record further disclosed that the Savings and Loan, hereinafter designated "S & L", specifically typed in the word "mortgage" in the blank provided to complete the sentence "I desire mortgage insurance coverage" and that the disclosure statement varied and reflected a higher amount than the original amount shown in an earlier "loan request sheet" prepared by the "S & L" and which was referred to by the officer as a document that everyone in the "S & L" hated and which was eventually changed.

Another "S & L" officer of the Petitioner testified that in the majority of instances the mortgage life insurance had not been approved until after the closing; that it was customary for the "S & L" to furnish forms of mortgage life insurance for

the customer even to the extent of filling in a portion of the applications; that the "S & L" dealt with one mortgage insurance company called the "National Old Line Company"; that payments would be made through the "S & L" by the customer with their regular mortgage payment; that the "S & L" would in turn pay all life insurance premiums every 6 months with a lump sum payment for all insured customers and that premium notices would be mailed by the insurance company to the "S & L" instead of the customer.

The record also revealed that Petitioner "S & L" was paid percentage fees by the life insurance company for collecting and remitting policy premiums; that the "S & L" had a person particularly designated in its office to handle the accounting for the collection of premiums; that the "S & L" made no attempt to communicate with Respondents regarding the clause signed by the decedent Respondent signifying his request

for mortgage insurance and that the document was put in a security file and nothing more was done with it.

The evidence, by admission of the "S & L" officer, showed that she didn't know whether there was the usual follow-up by a bank official to see whether or not the Respondent received an application for mortgage life insurance as was the usual policy of the "S & L".

SUMMARY OF ARGUMENT

The identical facts and issues raised by Petitioner were decided in the Fourth Circuit Court of Appeals case of Burgess vs. Charlottesville Savings and Loan Assoc., 477 F 2d 40 (1973) in line with previous cases and followed by subsequent analogous case law. The case at bar presents no federal question.

The Federal Regulation Z form which involves the Federal Truth-in-Lending Act regarding disclosure is not an issue of the case. Respondent acknowledges that the disclosure as required by the form and act was properly made prior to her final loan arrangements with the Petitioner. The real basis on which Respondent filed her action and upon which the case was decided in the Ohio courts was alleged contract or agreement to procure insurance, the breach of which gave rise to an action both in contract and tort under the common law of Ohio. Although the alleged agreement had in part its origin in the Federal Regulation Z form this was incidental and the basic issue decided in the case was whether the language used by the Petitioner in its form of loan application was sufficient to be the basis for the creation of a contractual right or violation of a fiduciary duty determinable solely under Ohio law and not federal law.

ARGUMENT AND REASONS FOR DENYING THE WRIT

The very same issues submitted by Petitioner with identical facts as the case at bar was decided by the Fourth Circuit United States Court of Appeals in the leading case of Burgess vs. Charlottesville Savings and Loan Association, 477 Fed. Reporter 2d 40 (April 9, 1973). In that case the U. S. Court of Appeals ruled that where the real basis of plaintiffs cause of action was alleged breach of agreement to procure credit life insurance, thereby giving her, under her theory, cause of action both in contract and in tort under state law, even though the alleged agreement had its origin in the Regulation Z notice form intended by the Savings and Loan Company as a compliance with the Truth-in-Lending Act and regulations promulgated by the Federal Reserve the action presented no federal question upon

which the result would depend and was determinable solely by state law.

The U. S. Court of Appeals in the Burgess case under identical facts and involving the exact language contained in the Federal Regulation Z form ruled that the purpose of the Truth-in-Lending Act is to permit the borrower, with full knowledge of costs, to make comparisons preceding the final closing of the loan. The Court noted that it is the obligation to disclose, not the duty of subsequent performance, towards which the Act is directed. The Court maintained that the Act provided its own remedy for the failure to make disclosure as required with which the savings and loan company fully complied. Thus, the Plaintiff did not have any right to the statutory remedy authorized for a violation of the Truth-in-Lending Act but the construction of the language in the Federal Regulation Z form was an issue under Virginia law as to

whether a valid contract to procure credit life insurance was effected between the parties.

The Burgess case is clear and concise but in order to give emphasis to its ruling the Court reiterated its reasoning in summary form on page 45 of its decision which reads in pertinent part as follows:

> "To repeat: Her action is for failure to perform on what she claims was an offer by the defendant to procure and an acceptance of that offer by her and her deceased husband. Such action involves a construction of the language in the form used by the defendant to give disclosure required under the Truth-in-Lending Act, it is true, but not for the purpose of determining whether that language represents sufficient compliance with the Act (and thus a construction of federal law) but for the purpose of determining whether such language will under the law of

Virginia constitute a valid contract to procure. Such an action presents no federal question upon which the result of the action will depend. The District Court should remand the cause to the State Court.

Remanded with instructions to the District Court to remand the cause to the State Court from which it was removed." (Emphasis added.)

Likewise, in the case of Westland Oil Development Corp. vs. Summit Transportation Company, 481 F. Supp. 15 (1979) which was affirmed in 614 F. 2d 768, the United States District Court of Texas ruled that "breach of contract claims are not converted to federal causes of action just because contractual language at issue has been included in order to comply with federal regulations." The Texas Court affirmed by the U. S. Court of Appeals cited the Burgess case and numerous other cases in support of its

ruling to deny federal court jurisdiction. (See also Washington vs. Rothenberg, 436 F. Supp. 699 [1977].)

In the case of Cabana Management Inc. vs. Hyatt Corporation, 441 F. 2d 862 (1971) the Fifth Circuit United States Court of Appeals stated at page 864:

> "... when the controversy between the parties may be decided under local law without the necessity of interpreting a federal statute, there is no federal jurisdiction."

This Supreme Court observed in the early case of Shulthis vs. McDougal, 225 U. S. 561, 32 S. Ct. 704, 56 L. Ed. 1205 (1912) that a question of federal law often lurks in the background of a case, but this alone does not confer jurisdiction upon the federal courts. The reasoning is stated as follows at page 579 of said U. S. Reports:

> "A suit to enforce a right which takes its origin in the laws of the United

States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

The case at bar is identical as to the facts and issues raised in the leading Burgess case cited supra followed by numerous Appellate Courts and with the prevailing views cited in the other Appellate Court cases this case clearly does not involve a federal issue and does not qualify for consideration of a writ of certiorari under Rule 17 of the rules of this Supreme Court.

CONCLUSION

Pursuant to the Burgess case law cited directly in point with the case at bar and Rule 17 of the Rules of this United States Supreme Court Respondent respectfully requests that Petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

Frank R. Bodor
Respondent's Attorney
and Counsel of Record

CERTIFICATE OF SERVICE

All parties required to be served have been served with a copy of Respondent's Brief by depositing this 30th day of October, 1981, three (3) copies of Respondent's Brief in the United States Mail, with first-class postage prepaid, addressed to Petitioner's Counsel of Record, Attorney John A. Hallbauer, Parks, Eisele, Bates & Wilsman, 1100 The Illuminating Building, Cleveland, Ohio, 44113.

Frank R. Bodor
Respondent's Attorney
and Counsel of Record